Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1129

ETTORE COCO, a/k/a EDDIE COCO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MIAMI REVIEW — 371-4853 — 377-3721

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in the Supreme Court of the United States

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ETTORE COCO, a/k/a EDDIE COCO,
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ETTORE COCO, a/k/a EDDIE COCO, Petitioner herein, by his undersigned attorney, respectfully prays that this honorable Court issue its Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated October 29, 1976, in which the United States Court of Appeals affirmed the Order denying an evidentiary hearing from the United States District Court for the Southern District of Florida dated February 12, 1976; and to review the Order of the United States Court of Appeals denying a Petition for Rehearing en banc, dated December 23, 1976.

OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, affirming the United States District Court's order in this cause is not published. Said opinion was delivered on October 29, 1976, a copy of which is attached as Exhibit A. A copy of the order denying the Petition for Rehearing en banc is attached hereto and marked Exhibit B. A copy of the order denying Motion to Vacate Sentence is attached hereto and marked Exhibit C. A copy of the Motion to Vacate Sentence pursuant to 28 U.S.C. 2255 is attached hereto and marked Exhibit D.

JURISDICTION

Jurisdiction of the Court is invoked under Title 28 United States Code, Section 1254 (1).

QUESTION PRESENTED

AN EVIDENTIARY HEARING IS REQUIRED WHEN A MOTION TO VACATE ALLEGES NEWLY DISCOVERED EVIDENCE NOT AVAILABLE AT THE TIME OF TRIAL WHICH IS MATERIAL TO THE CASE AND MIGHT AFFECT THE JUDGMENT OF THE JURY.

UNITED STATES STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Title 28 U.S.C., Section 2255, which states:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing theron, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

STATEMENT OF THE CASE

On October 17, 1972, Petitioner was sentenced to fifteen years imprisonment for violation of Title 18 U.S.C., Sections 892, 894 and Title 18, Section 1951. The sentence was imposed by the Honorable Peter T. Fay, United States District Judge for the Southern District of Florida.

On November 10, 1975, a Motion to Vacate Sentence was filed pursuant to Title 28 U.S.C., Section 2255 (R. 1-18).

On November 10, 1975, a Request for Evidentiary Hearing pursuant to Title 28 U.S.C., Section 2255 was filed (R. 19-20), together with a memorandum of law in support of the Motion.

On November 18, 1975, an Order to Show Cause was entered by the District Judge requiring a response by the Government (R. 28).

On December 8, 1975, a response to Petitioner's Motion for New Trial was filed by the Government (R. 29-110).

On February 12, 1976, the Order denying the Motion to Vacate was entered by the District Judge (R. 111-112).

The United States Court of Appeals for the Fifth Circuit affirmed that Order without opinion. It is from that Order of affirmance that this Petition has been filed.

STATEMENT OF THE FACTS

Petitioner, ETTORE COCO, after a jury trial, was found guilty of (1) violation of 18 U.S.C. 1951, (2) conspiring to violate 18 U.S.C. 892, (3) conspiring to violate 18 U.S.C. 894, and (4) substantive violations of 18 U.S.C. 892 and 894.

A detailed statement of the evidence is set out in *United States v. Nakaladski*, 481 F.2d 289 (1973), cert. denied December 3, 1973, Nos. 73-376, 73-449.

In his Motion to Vacate under Title 28 U.S.C., Section 2255, the contention was made that important evidence, exculpatory in nature, had been withheld which would have affected the outcome of the case, specifically:

(a) Michael Kinney, an attorney in Tampa, Florida, would testify, if permitted, that Henzel was coerced on eleven separate occasions by a U.S. Attorney to state that a meeting took place in Leo Goodman's office (another witness against Petitioner) between Henzel and COCO, where Henzel was threatened when, in fact, no such meeting had ever taken place, and the Government was so informed.

(b) a co-defendant, LOUIS NASH, had been granted an evidentiary hearing pursuant to a Motion to Vacate while this Petitioner had never been given the opportunity to present the newly discovered evidence.

(c) Joel Whitice testified against Petitioner. An Affidavit appended to the Motion to Vacate by one Charles Curry stated that Joel Whitice had never seen Petitioner in his life, did not know him; Whitice had testified to

Charles Curry that he, Whitice, had a "tax problem" and that if he would help the Government, "the Government would help" in his tax problems. The Government's help from Whitice would be his testimony against this Petitioner.

(d) co-defendant, JAMES FALCO, had fled the jurisdiction and was not available at the time of the trial. His testimony was crucial and could not have been cumulative. He was alleged to have been the lender of the funds which the Government contended had been collected on a few occasions by the Petitioner herein. Therefore, he was the crucial link in the chain between the Petitioner and the alleged victims. FALCO fled and was not apprehended until long after the trial. He testified at an evidentiary hearing for co-defendant, NASH, that this Petitioner, COCO, had never collected money for him. That testimony was not available at the time of the trial and could not have been secured by reasonable diligence. It was by definition not cumulative. It was highly competent and of such a nature as to affect the judgment of the jury.

REASONS FOR GRANTING THE WRIT

The factual matters alleged in the Motion to Vacate are of such nature as to warrant relief, if true. It cannot be said that, assuming the veracity of the allegations of the pleadings filed under Title 28, Section 2255, Petitioner is entitled to no relief. Under such circumstances, the determination of the accuracy of the allegations cannot be made without the holding of an evidentiary hearing.

It is not contended at this point that a Motion to Vacate was warranted. It is only contended that from a

constitutional point of view, due process required the right of Petitioner to present proof in support of those allegations to the Court, even if Petitioner, himself, was not present.

The original indictment involved three defendants; one fled prior to trial. He could not therefore, with reasonable diligence, have been presented by Petitioner at the trial as a witness in Petitioner's defense. The motion, however, sought to present the testimony of that original co-defendant, FALCO, to specifically testify in matters beneficial to Petitioner. The second co-defendant, NASH, having been denied a severance, could not have been presented in support of Petitioner's defense at the trial.

The Motion to Vacate also tendered specific testimony to be adduced in matters beneficial to Petitioner by NASH. The motion, under Section 2255, also declared that a witness, unknown to Petitioner, had advised the Government of the fact that the testimony concerning that witness presented at the trial was false, though the Government circumvented the problem by presenting the facts concerning that witness through a third person. Assuming the proof of these allegations contended in Petitioner's motion to the Court, certainly a new trial was warranted. It would be most especially true in the case at bar, where the evidence concerning the alleged victims was sparse and the facts proven through disconnected contentions of extortion.

In support of his position in this case, Petitioner relies upon the following opinions of this Court:

The prosecutor's constitutional duty to reveal evidence to the defendant was first recognized in *Mooney v. Holohan*,

299 U.S. 103, 55 S.Ct. 340, 79 L.Ed 791 (1935); and in *Pyle v. State of Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed 214 (1942). In *Pyle*, supra, the Supreme Court said:

> "Petitioner's papers * * * set forth allegations that his imprisonment resulted from perjured testimony knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle Petitioner to relief from his present custody." (317 U.S. at 215-216, 63 S.Ct. at 178.)

Two lines of decisions emerge from these cases. The first line involves cases in which the prosecutor suborned perjury or knowingly used perjured testimony at trial. *Alcorta v. State of Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed 2d 9 (1957); *Napue v. State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed 2d 1217 (1959). The rationale of these cases appears to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated.

In *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed 2d 215, 83 S.Ct. 1194, the Supreme Court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly."

In *Fontaine v. United States*, 411 U.S. 213, 36 L.Ed 2d 169, 93 S.Ct. 1461, the Supreme Court stated:

> "It is equally clear that Section 2255 calls for a hearing on such allegations unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . .' ".

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Petition for Writ of Certiorari be granted so that the entire record in this cause may be briefed in full and reviewed.

Respectfully submitted:

GRUSMARK, JAFFE,
KARTEN, P.A.
Counsel for Petitioner
3628 N.E. Second Avenue
Miami, Florida 33137

BY: _____
MILTON E. GRUSMARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was forwarded to: Honorable Gary L. Betz, United States Department of Justice, 111 N.W. 5th Street, Miami, Florida 33128; and to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 19th day of January, 1977.

_____
MILTON E. GRUSMARK

APPENDIX

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1675
Summary Calendar*

ETTORE COCO, a/k/a, EDDIE COCO,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(October 29, 1976)

BEFORE BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 23, 1976

EDWARD W. WADSWORTH
CLERK

Tel 504-589-6514

600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL COUNSEL OF RECORD

NO. 76-1675 — Ettore Coco, etc. v. USA

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: Susan M. Gravois

/sg

cc: Mr. Milton E. Grusmark
Mr. Gary L. Betz

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-2516-CIV-PF

ETTORE COCO a/k/a EDDIE COCO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER DENYING MOTION TO VACATE SENTENCE

Ettore Coco, a/k/a Eddie Coco, represented by private counsel, has filed a motion to vacate sentence pursuant to 28 U.S.C. §2255, attacking his conviction in Case No. 72-450-Cr-PF, upon the ground of newly discovered evidence. The government has filed a memorandum of law in response to an order to show cause previously entered herein, and petitioner has replied to the response.

The Court has studied this petition and the attendant affidavits and memoranda in detail, and finds no basis for an evidentiary hearing. The allegations concerning Leo Henzel have been considered and determined adversely to petitioner in a previous §2255 proceeding. Ettore Coco a/k/a Eddie Coco v. United States of America, Case No. 74-158-CIV-PF, aff'd., 505 F.2d 732 (5 Cir. 1974). No diligence in attempting to secure at the time of trial the evidence now said to be available from Charles

Curry has been shown; nor is there any indication that such evidence would do more than simply serve as a weak attempt at impeachment of existing overwhelming evidence of guilt. The allegation that if petitioner were tried anew he would produce exonerating evidence from his codefendant, James Falco, is simply too little, too late. The value of such evidence is dubious at best, and no predicate was laid at the time of trial for this claim that Coco was prejudiced by Falco's absence. Finally, the contention that the codefendant, Louis Nash, would now testify for Coco certainly does not qualify as newly discovered evidence in view of Coco's previous efforts to secure his availability as a witness by motion to sever, the denial of which was affirmed upon direct appeal. United States v. Nakaladski, 481 F.2d 289 (5 Cir. 1973).

Each of the issues raised in this motion have been heard and reheard by this Court during the course of the original trial of this cause and its proliferation of progeny. Thereupon, it is

ORDERED AND ADJUDGED that this motion to vacate sentence is denied.

DONE AND ORDERED at Miami, Florida, this 12th day of February, 1976.

PETER T. FAY
United States District Judge

cc: Angelo A. Ali, Esquire
Milton E. Grusmark, Esquire
Gary L. Betz, Esquire

EXHIBIT D

MOTION PURSUANT TO 28 U.S.C. 2255
ATTACKING SENTENCE IMPOSED BY COURT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. ————
(for Clerk's use only)
IN RE: 72-450-Cr-PF
(Criminal Case Number)

ETTORE COCO a/k/a EDDIE COCO
Petitioner,

vs

UNITED STATES OF AMERICA,
Respondent.

INSTRUCTIONS
(Read carefully—must be filed in triplicate)

For this motion to receive consideration by the District Court, all copies must be legibly handwritten or typewritten, signed by the Petitioner, notarized, and set forth in concise form the answer to each applicable question. If necessary, Petitioner may finish his answer to a particular question on the reverse side of the same page, or on an additional blank page, clearly indicating to which question such continued answer refers.

Since every motion under this Section must be sworn to under oath, any false statement of a material fact herein may serve as the basis of prosecution and conviction for perjury. Extreme care should, therefore, be exercised to assure that all answers are absolutely true and correct.

Upon completion, the original and both copies must be returned to the: Clerk, United States District Court, Southern District of Florida, P. O. Box 669, Miami, Florida, 33101, together with the $15.00 filing fee for commencing this proceeding or, if applicable, an affidavit in forma pauperis sworn to under oath.

1. Place of present detention Florida State Prison, Avon Park, Fla.

2. Name and location of court, and Judge who imposed sentence United States District Court, Southern District of Florida Honorable Peter T. Fay

3. With reference to your conviction, list the following:

(a) Case No. 72-450-Cr-PF

(b) Offense Conspiracy to obstruct interstate commerce, extortion

(c) Title & Section of U.S. Code Title 18 USC, Sec. 892, 894, 1951

(d) Sentence imposed Fifteen (15) years imprisonment

(e) Date sentence imposed October 17, 1972

4. Check the nature of your plea prior to a finding of guilty: Not Guilty

5. If your plea was not guilty, check if you were found guilty by: a Jury

6. Did you appeal the judgment of conviction?

Answer: Yes

7. If you answered "yes" to Question Number 6 above, list:

(a) Appellate Court Fifth Circuit Court of Appeal

Date of Appeal October 24, 1973

Result Affirmed

Date of result July 6, 1973, rehearing denied July 30, 1973

Citations of written opinions or orders entered pursuant thereto 481 F.2d 189 (1973)

(b) Appellate Court United States Supreme Court

Date of Appeal August 1973

Result Petition for Writ of Certiorari Denied

Date of result December 3, 1973

8. Were you represented by an attorney during the course of your:

(a) Arraignment and plea? Yes

Name of attorney Frank Ragano

Address of attorney Suite 400, Roberts Building, 28 West Flagler Street, Miami, Fla.

Was attorney Court appointed? No

(b) Trial (if applicable)? Yes

Name of attorney Same as above

Address of attorney Same as above

Was attorney Court appointed? No

(c) Sentencing? Yes

Name of attorney Same as above

Address of attorney Same as above

Was attorney Court appointed? No

(d) Appeal (if applicable)? Yes

Name of attorney Same as above

Address of attorney Same as above

Was attorney Court appointed? No

(e) Preparation, presentation or consideration of any other post-sentence, petitions, with respect to this conviction? None

9. State concisely all the grounds on which you now base your allegation(s) that sentence imposed upon you is invalid. Any ground not set forth in this motion will not be hereafter considered.

(a) Ground alleged—

Petitioner has recently discovered evidence that information favorable to Petitioner, and exculpatory in nature, was withheld by the Government and that said information was important evidence and would have affected the outcome of the case, thereby depriving the Petitioner of due process of law as guaranteed to him by the Fifth Amendment of the Federal Constitution. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). An Affidavit is attached hereto and made a part hereof, and marked for identification as Petitioner's Exhibit "A".

State facts (concisely) which support ground (a) hereinabove—

SEE ATTACHED EXHIBIT "A".

(b) Ground alleged—

Petitioner has recently discovered evidence that one of the Government's chief witnesses at the trial of the above

entitled cause, to wit: Leo Henzel, testified about certain matters that were highly prejudicial to the Petitioner, which matters the said Leo Henzel had no personal knowledge of, and that the said testimony deprived the Petitioner of a fair and impartial trial and due process of law as guaranteed to him by the Fifth and Sixth Amendments of the Federal Constitution. An Affidavit is attached hereto and made a part hereof, and marked for identification as Petitioner's Exhibit "B".

State facts (concisely) which support ground (b) hereinabove—

SEE ATTACHED EXHIBIT "B".

(c) Ground alleged—

The Petitioner, ETTORE COCO, has recently uncovered newly discovered evidence that one of the Government's chief witnesses at the trial of the above entitled cause, to wit: Joel Whittice, testified about certain matters that were highly prejudicial to this Petitioner. Attached hereto and made a part hereof and marked for identification as Petitioner's Exhibit "C", is an Affidavit of one Charles Curry wherein he states that prior to the trial of the aforementioned cause, Joel Whittice stated to him that he never saw Eddie Coco in his life; that he did not know Eddie Coco and he would not know him if he saw him face to face. Whittice further stated to Charles Curry that he had a "tax problem" and that if he would help the government, "the government would help" in his tax problem. The government's help from Whittice would be that he would have to testify against Eddie Coco.

Additionally, Michael Kinney, Esquire of Tampa, Florida, would be ready and willing to testify, if permitted, to the effect that one Leo Henzel, another key Government witness was coerced on 11 separate occasions by one Gary Betz, Esquire, the United States Attorney for the U.S. Department of Justice Strike Force, to state that a meeting took place in Goodman's office between Henzel and Eddie Coco, wherein Henzel was threatened, thereby causing him to weep, when, in fact, no such meeting ever took place.

State facts (concisely) which support ground (c) hereinabove—

SEE ATTACHED EXHIBIT "C"

NOTE: (See Ground alleged (d) and (e) on separate paper attached hereto.)

10. Has any ground set forth in Question No. 9 hereinabove been previously presented to this or any other Federal Court by way of motion under Section 2255 of Title 28, U.S.C., or petition for writ of habeas corpus, or any other applications, petitions or motions?

Answer: Yes

11. If you answered "yes" to Question No. 10 above, list:

(a) Grounds previously presented Same as No. 9 (a) and (b) above

Nature of proceeding 28 U.S.C. Section 2255

Name of Court United States District Court, Southern District of Florida

Date February 7, 1974

Louis Nash, a/k/a Louis Nakaladski, a co-defendant in this case was granted a evidentiary hearing pursuant to his Motion to Vacate his sentence in accordance with 28 U.S.C. Section 2255. The Petitioner, ETTORE COCO, was never given the opportunity to present the aforementioned newly discovered evidence which in and of itself constitute a violation of due process of law as guaranteed by the 14th Amendment of the Constitution.

(e) Ground alleged—

Petitioner has available newly available evidence which could not have been presented at the time of the trial.

Facts which support ground (e) hereinabove—

Co-defendant, James Falco, had fled the jurisdiction and was not available at the time of the trial. His testimony was crucial and could not have been cumulative. He was alleged to have been the lender of the funds which the Government contended had been collected on a few occasions by the Petitioner herein. Therefore, he was the crucial link in the chain between the Petitioner and the alleged victims. James Falco had fled and was not apprehended until long after the trial. He testified at an evidentiary hearing for co-defendant, Nash, that this Petitioner, Eddie Coco, had never collected money for him. That testimony was not available at the time of the trial and could not have been

through reasonable diligence. It was by definition not cumulative. It was highly competent and of such a nature as to affect the judgment of the jury.

Petitioner also has available beneficial testimony of the Co-defendant, Louis Nash. His testimony could not have been presented until post-conviction remedies were available since a severance was denied and Nash's Fifth Amendment right under the United States Constitution prevented his being called as a witness at trial.

12. Have you previously filed any other motions under Section 2255 of Title 28, U.S.C., petitions for writ of habeas corpus, or any other applications, petitions or motions with respect to this conviction?

Answer: Yes

13. If you answered "yes" to Question No. 12 hereinabove, list with respect to each such application, petition or motion:

(a) Name of Court United States District Court Southern District of Florida

Location of Court Miami, Florida

Nature of application Motion attacking sentence

Result Denied

Date of result March 18, 1974

Citations of written opinions or orders entered pursuant thereto See Attached Order

14. If you lack the statutory filing fee ($15.00) and are seeking leave to proceed in forma pauperis, have you carefully read and completed the sworn affidavit on Page 7? (Any false statement is punishable by law.)

Answer: _____

ETTORE COCO

(Signature of Petitioner)

VERIFICATION OF PETITION

The undersigned, being first sworn under oath, presents that he has subscribed to the foregoing Petition and does state that the information contained therein is true and correct.

ETTORE COCO

Signature of Affiant

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 23rd DAY OF SEPTEMBER, 1975.

MARK RICHARD BAER

Notary Public